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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. ____

JAMES JACKSON, INDIVIDUALLY AND AS A MEMBER OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS,
Petitioner

v.

THE DEPARTMENT OF PUBLIC SAFETY FOR THE STATE OF LOUISIANA, AND DONALD BOLLINGER, AS SECRETARY OF THE DEPARTMENT OF PUBLIC SAFETY FOR THE STATE OF LOUISIANA, AND G. W. GARRISON, DEPUTY SECRETARY FOR THE DEPARTMENT OF PUBLIC SAFETY FOR THE STATE OF LOUISIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 22, 1986

QUESTIONS PRESENTED

1. If the right to continued employment for the tenured State employee is constitutionally protected, does that protection extend to the fruits of that employment, i.e., the right to be paid and what is given in payment for the work performed.

2. In determining whether or not compensatory time utilized by the Department of Public Safety as payment for hours worked was property, the District Court looked to the manner in which the State deprived the petitioner of the compensatory time. Was this a constitutionally impermissible method of analysis which merged substance with procedure?

3. Does the State have 11th Amendment immunity from the claims of an individual against the State under the 5th and 14th Amendments?

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner JAMES JACKSON, ET AL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this

proceeding which merely affirmed without comment, the judgment and opinion of the lower court dated July 20, 1984 and December 27, 1985.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion was rendered by the District Court for the Middle District of Louisiana and also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circit was entered on September 5, 1986. A timely petition for rehearing en banc was denied on October 2, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. If the right to continued employment for the tenured State employee is constitutionally protected, does that protection extend to the fruits of that employment, i.e., the right to be paid and what is given in payment for the work performed.

2. In determining whether or not compensatory time utilized by the Department of Public Safety as payment for hours worked was property, the District Court looked to the manner in which the State deprived the petitioner of the compensatory time. Was this a constitutionally impermissible method of analysis which merged substance with procedure?

3. Does the State have 11th Amendment immunity from the claims of an individual against the State under the 5th and 14th Amendments?

STATEMENT OF THE CASE

The petitioner is a commissioned state police officer in the Department of Public Safety and Corrections for the State of Louisiana (formerly the Department of Public Safety for the State of Louisiana, hereinafter the Department). The Department is a public corporation as defined by La. Rev. Stat. Ann. Sec.36:401(A) (West 1986). ["The Department of Public Safety and Corrections is created and shall be a body corporate with the power to sue and be sued."] The petitioner cannot be discharged except for cause. He is paid based on an hourly rate determined by his classification under the Uniform Pay

Plan, promulgated as part of the State Civil Service Regulations. (Selected State Civil Service Rules are provided as Appendix A - rules made reference to below are contained in Appendix A.)

Petitioner filed suit to recover compensatory time paid him and then taken from him by State officials without due process. State Statute and Civil Service Rules, which govern the petitioner, specifically provide that the petitioner must be paid for overtime worked. The defendants have intentionally and systematically taken petitioners overtime pay. This taking has been effectuated by the use of discretionary powers vested in the defendants which allows them to require that the petitioner work overtime hours and then, by selecting the manner of compensation, refuse to pay petitioner for the work. No prior notice of the taking or hearing in regards to the taking is afforded the petitioner.

The hours worked by the petitioner are controlled by the dictates of his superior officers. When the petitioner has worked over forty (40) hours in a calendar week, he is deemed to have worked

overtime hours. The petitioner is required to work these overtime hours, or suffer discharge or disciplinary action being taken against him.

Although the Department is required by Civil Service Regulation to pay the petitioner for all overtime hours worked, the manner of payment is under the control of the defendants; it can be either in cash or compensatory time. The Department consistently chooses compensatory time and it is solely within the discretion of the supervising officers as to whether or not the petitioner can in fact use the compensatory time. The Department routinely refuses petitioner the use of his compensatory time: it is at this point that the deprivation becomes a foregone conclusion. If by the end of the calendar year the petitioner has been prevented from the utilization of the compensatory time by his superiors, the compensatory time in excess of 45 days is stricken from the records of the Department by the operation of La. Civil Service Rule 11. 29 (f). This has been the effective practice of the Department for the period of time in question.

The petitioner has worked, within many calendar

years, hours in excess of forty (40) hours per week, and has earned compensatory time which has been credited to him in the books and records of the Department. Despite the appropriate request from the petitioner to utilize his compensatory time, he has been routinely denied such use. His compensation for overtime hours worked, his compensatory time, has been taken at the end of each calendar year to the extent it exceeded 45 days. This deprivation has occurred not only to the petitioner, but to numerous other employees of the Department who perform, as part of their duties, extensive overtime hours and have been paid, at the discretion of the Department, not in cash but with compensatory time. Undercover narcotics officers and dectectives are the type of State police employees routinely deprived of compensatory time by the Department.

The obligation owed to the petitioner by the Department is fixed when the overtime hours are worked. His payment for that work is mandated by La. Civil Service Rule 6.25 and L.R.S. Sec. 40:1373, however, the Department has a choice as to the manner

of payment, and it is in the exercise of that choice, as well as a manner in which the Department directs the activities of the petitioner, that the taking of the paid compensation is effectuated. It is those discretionary actions solely within the control of the Department and the supervisors of the petitioner which give rise to the loss of the compensatory time by the effects of Rule 11.29(f).

The instant action was brought before the Middle District Court of Louisiana. The complaint of the petitioner requested that the compensatory time, taken by the operation of Rule 11.29(f), either be returned to him or that he be compensated for the taking under the 5th and 14th Amendments: that the Department and the individual defendants be prevented from the continued utilization of Rule 11.29(f) as a means of divesting the petitioner of his compensatory time: that damages and attorneys' fees be awarded for the wrongful taking itself under 42 U.S.C. 1983 and 1988: and, that the matter be certified as a class action for the benefit of all similarly situated individuals.

The Department, raising the 11th Amendment as a defense, was removed from the action on motion to

dismiss for want of jurisdiction. Separately, on motion for summary judgment, the individual defendants were dismissed. The defendant's motion for summary judgment only raised the issue of qualified immunity. It was this issue that was briefed and argued to the District Court: it was this issue that was addressed in the petitioner's affidavits. The District Court decided the motion for summary judgment, not on the issue of qualified immunity, but on a finding that the compensatory time utilized as payment for overtime hours worked was not "property". The issue of property appeared only obliquely in the oral arguments for summary judgment as a question which the Court had requested that the parties then brief.

All issues were appealed to the 5th Circuit of Appeals which affirmed, without opinion, the decision of the District Court. A timely request for a rehearing enbanc, was also denied without opinion.

REASONS FOR GRANTING THE WRIT

1. THE ANALYSIS UTILIZED BY THE DISTRICT COURT IN RAISING AND DETERMINING THE ISSUE OF PROPERTY IS IN CONFLICT WITH THIS COURT'S DECISION IN CLEVELAND BOARD

OF EDUCATION VS. LOUDERMILL.

What an individual expects from employment is not the work itself, but compensation for the work. This forms the basis for the employment relationship; an exchange of time or effort for compensation, a liberty interest for a property interest. It has been previously decided by this Court that property is not limited to a few rigid and inflexible characterizations, but that, as a concept, property denotes a broad range of interests which forms the basis for the individual's interaction with society at large. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Property is not a natural right, but a deliberate construction by society. The defense of private property has been almost entirely a defense of its abuse, an attempt to defend not individual property but the exercise of arbitrary power. See Reich, The New Property, 73 Yale L.J. 733 (1964) as cited and referenced in Goldberg v. Kelly, 397 U.S. 254, 261; 90 S.Ct. 1011, 1017 (1970).

The threshold issue in this matter is whether the

benefits of employment are the property of the employee. That which has been earned by the petitioner is payment for the work performed. The petitioner earned the right to be paid by having worked overtime hours for the Department. Civil Service Regulations requires the Department to pay the petitioner for overtime hours worked just as the petitioner is required to work the hours if directed by his superiors. The thing which is given in payment for the work performed comes into being when the overtime hours that have been worked, are entered on the records of the Department and finally converted into a notation that the petitioner is due compensatory time. There would be no argument before this Court if cash had been used to pay for the overtime hours and the Department was trying to recapture some from the petitioner's bank account. The overtime work has been performed. The payment for the overtime hours worked has occurred: what has been given in payment is the compensatory time.

As pointed out by the District Court, in its opinion on the Summary Judgment, if the compensatory

time being discussed is in fact the property of the petitioner, then the manner in which it was being taken was constitutionally impermissible (Opinions of the Dist. Ct., Nov. 27, 1985, at page 10). What the District Court failed to recognize was that the compensatory time was and is the property of the petitioner.

The substantive issue here should not be confused with those circumstances which otherwise arise in day to day employment relationships. Decisions by employers, such as the timing of coffee breaks or the scheduling of vacations, are not under consideration here. What is under consideration is the actual thing given in payment for the work performed by an employee. The compensation paid for work performed cannot be divorced from the employment itself as a constitutionally protected property interest. The protection of continued employment as a property right is of no value to the employee if the protection does not extend to what is earned by that employment. Cleveland Board of Education v. Loudermill, 407 U.S. ___, 105 S.Ct 1487, 1497; 71 L.Ed. 2d 265 (1985) (Justice Marshall concurring).

The attempt to define property has, in most circumstances, been undertaken by this Court in the context of due process. These discussions have demonstrated that property, as a concept, is as diverse as: claims of entitlement to continue employment Connell vs. Higgenbotham, 403 U.S. 207: 91 S.Ct. 1772: 29 L.Ed.2d 418 (1971): a prisoner's good time credit being accumulated under State law, Wolf vs. McDonnell, 418 U.S. 539: 94 S.Ct. 2963; 41 L.Ed 235 (1974): the continued utilization of utility service, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12; 98 S.Ct. 1554, 1561-1564; 56 L.Ed.2d 30 (1978): a high school education, Gross v. Lopez, 419 U.S. 565, 573-574; 95 S.Ct. 729, 735-736: 42 L.Ed.2d 725 (1975). These are not things which have been delivered into the hands of individuals: these things exist only on the records kept by some political body, corporation or organization.

There have been no hard and fast rules set forth which could be applied for the purpose of defining property. What in fact has occurred is that a process, a method of analysis, has been developed. An

examination of the cases such as Roth and Sindermann, supra, as well as the majority of those in which this Court has discussed the concept of property, discloses that the method of analysis utilized is critical to the determination itself. It would appear from this Court's decision in Loudermill that an error had crept into this process: that the determination of property, as a constitutionally protected institution, was being based on an analysis which tied the manner in which the right or interest could be divested from its owner by the State.

In Loudermill, the argument was put forth that the "right" was conditioned by the procedural limitations which accompanied the grant thereof. The procedure by which the "right" could be taken from the petitioner limited the scope of the "right" as a property interest itself. This argument had its genesis in the plurality opinion of Arnette v. Kennedy, 416 U.S. 134: 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), and has been characterized as the "bitter with the sweet" test. Aside from pointing out in Loudermill that a reliance on Arnette for this "bitter with the sweet" test was unfounded: the test itself

was ruled inappropriate and was clearly repudiated by this Court.

Property, under the Arnette test, can be defined by the method which the State takes it. Although not so labeled, this is the same method of analysis used by the District Court in the instant case. This analysis gave rise to the Court's erroneous conclusion that compensatory time was not property. The District Court went to great lengths to review the regulatory basis upon which the compensatory time was used as payment for overtime hours worked. In doing so, the Court clearly relied on that section of the regulatory language which permitted the taking of the compensatory time at the end of the year. This was the key to the District Court's decision, for once having accepted the proposition that the definition of property is tied to the manner in which the State exercises its ability to take it, the Court was capable of sweeping away any other argument to the contrary.

If "[p]roperty cannot be defined by the procedures provided for its deprivation any more than

can life or liberty ...." (Loudermill at page 1493), then it is essential to divorce from the analysis used to determine what is to be afforded constitutional protection, the procedures by which it can be taken. Only after the determination that property exists can the method of divestiture be considered. The inquiry then becomes whether or not the divestiture provision meets a constitutional standard, Loudermill at page 1493.

The District Court found that the petitioner accepted employment knowing he might be paid for overtime hours with compensatory time, which in turn may be taken under Rule 11.29(f). The Court then concluded that the compensatory time was not property. This is a repackaging of a discredited theory of property. For example, we know that one might not be able to require a state to issue a driver's license but once so issued that license is a protected property right, even though it is issued with the understanding that violations of the law will cause its suspension or revocation. Bell v. Brunson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971). The petitioner does not have the right to work

overtime hours, nor on the other hand may he refuse to work them. However, once the work is performed, it is required that he be paid for it and when he is paid for it what is given in payment is his property (Rule 6.25). To permit the reasoning of the District Court to stand would basically be an affirmation that the State can exercise its unfettered will in regards to the property rights of its employees.

The compensatory time given in payment is like any other protected property. Even a right as basic as life itself cannot, in many jurisdictions, be held without risk of loss by State action. It is not the risk of loss, however, which qualifies the right as constitutionally protected or not. The essence of a protected right is not that it might be taken for some permissible reason, but that before it is lost or deprived, there will be some inquiry as to whether the taking is proper, Logan v. Zimmerman Brush Company, 455 U.S. 422, 432: 102 S.Ct 1148, 1155: 71 L.Ed.2d 265 (1982). In the instance of a right which has the form of property, the 5th Amendment requires that it be taken only after some form of due process

and with compensation given for the taking.

The impact of the District Court's decision is not only upon the petitioner. The State of Louisiana has approximately 63,900 classified state employees. Those employees which would fall within the various ratings and scales entitled to payment for overtime hours worked number about 81 percent of the work force, or 51,700 employees. The analysis need not be confined, however, solely to the State of Louisiana. Department of Labor statistics relate that there are are 13,000,000 state and local government employees. If the Louisiana experience can in fact be extrapolated nationwide, it becomes obvious that there are a great number of people who could be deprived of earned property by a continuation of rulings such as the District Court's in this case.

2. DECISION BELOW FAILS TO RECOGNIZE THAT ACTIONS BASED ON THE FIFTH AMENDMENT ARE NOT BARRED BY THE 11TH AMENDMENT.

As noted previously, part of the relief requested by the petitioner is a return of the property taken. This puts at issue the petitioner's contention that the District Court erred in dismissing

the Department on the 11th Amendment grounds. It is clear from the previous holdings of this Court that the 11th Amendment does not bar an action which puts at issue the constitutionality of a state statute Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908): nor does the 11th Amendment bar an action brought under the 5th Amendment against the individual defendants, or their successors, acting in their official capacity. Carson v. Domestic Farm, Inc. 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed.2d 1628 (1949).

Neither the Department nor the individual defendants claim any need, use for, or title to, the property taken. An action brought for the return of that property is within the jurisdiction of the Court and the 11th Amendment does not act as a bar. Florida Department of State v. Treasurer Salvors, Inc., 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed. 2d 1057 (1982).

It is important to focus on the fact that petitioner requests several forms of relief below. The petitioner is requesting that the property taken from him be returned or that he be compensated for

same, if return is not practical or feasible. Separately the petitioner asks that damages be awarded for the wrongful taking itself, as well as attorney's fees. The first form of relief is based on the mandate of the 5th Amendment. The latter requests for relief are founded on 42 U.S.C. 1983 and 1988.

It was one of the petitioner's original contentions that by the adoption of the State Constitution of 1974, the State had in fact waived its 11th Amendment immunity. (La. Const. Art. 12, Sec. 10(A) ["No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property."]. See also La. Rev. Stat. Ann. Sec 13:5108.1 (West 1986). The recent decision in Atascadero State Hospital v. Scanlon, ____ U.S. _____, 105 S.Ct. 3142 (1985), may be seen as diminishing the import of the argument; however, it does not detract from the right of petitioner to proceed under the mandates of the 5th Amendment.

The only real defense that has been raised to the request for relief in the form of damages and

attorney's fees under 42 U.S.C. 1983 and 1988 is made on behalf of the individual defendants and is a claim of good faith immunity. This defense has never been reached by the District Court and is a question of fact for a jury to determine.

The dismissal of the Department despite the clear implications of relief which could be granted under the 5th Amendment certainly conflicts with this Court's previous decision in Logan v. Zimmerman Brush, 455 U.S. at 432.

3. THE PREDIVESTITURE HEARING REQUIRED BY HUDSON v. PALMER IS NOT PROVIDED FOR.

The operation of Civil Service Rule 11.29(f) is automatic. The taking of property complained of occurred without either a predivestiture or postdivestiture hearing. The taking, through enforcement of this Rule by the individual defendants on behalf of the Department, is a matter of established policy and/or practice. This taking, without a predivestiture hearing under such an established policy or practice, violates the mandates of the 14th Amendment. This Court has previously held

in Hudson v. Palmer, _____ U.S. _____, 104 S.Ct. 3194 (1984), that a post deprivation state remedy does not satisfy the 14th Amendment requirements if that deprivation is effected pursuant to an established State procedure.

Even assuming, arguendo, that a post deprivation remedy would in fact be constitutionally permissible, one has never been made available to the petitioner. The State Civil Service Commission, which is the body authorized to deal with complaints concerning the enforcement of Civil Service Regulation or the treatment of employees under such regulations, is limited in its review powers solely to cases of discharge, discipline or discrimination. Thoreson v. Dept. of Civil Service, 396 So.2d 367 (La. App. 1st Cir. 1981). Despite its previous holding in Clark v. The Department of Transportation & Development, 413 So.2d 573 (La. App. 1st Cir. 1982), the First Circuit Court of Appeals upheld the decision of the District Court (on the State level) dismissing the action of the petitioner in State Court. Jackson v. State of Louisiana, unpublished. This combination of lack of jurisdiction on the part of Civil Service Commission,

and refusal to accept jurisdiction on the part of the State Court, completely precluded the petitioner from any post deprivation hearing which would remedy the taking.

The District Court, at several of the oral arguments in the case, questioned what procedure in fact would be due, and what it would accomplish. Although it is not perhaps proper for the petitioner to be burdened with such an issue, it would be the petitioner's request that the predivestiture hearing required by the 14th Amendment and by this Court's previous decision in Hudson, be one in which several issues could be raised. Of primary concern is whether or not the number of hours which are being divested are properly calculated; whether or not other State Civil Service regulations have been taken into consideration which would obviate the need for the taking and, for that matter, whether or not the taking is constitutionally permissible. This review should be had prior to the taking, if only for the purposes of preventing the very type problem which has arisen at the State Court level. Finally, a hearing would

determine the compensation for the taking, e.g. straight time rates, or overtime rates: rates in effect when earned or when taken, or when compensated.

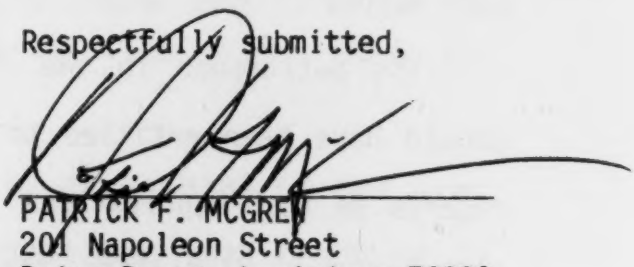
The petitioner in the face of the deprivation should have been entitled to a meaningful hearing in regards to that deprivation. The District Court, in its decision dismissing the individual defendants, seems to feel that the problem was not one of procedural due process, but one of substantive due process. In actuality, both problems now need to be considered. The problem of substantive due process was created by the Court's decision that what was given in payment for the overtime hours worked, was not, in law, the property of the petitioners. The problem of procedural due process exists because of the very manner in which the property is in fact taken.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Fifth Circuit in affirmation of the District Court. In the alternative, a remand for reconsideration in light of both Cleveland Board of Education v. Loudermill and State of Florida, Department of State v. Treasure

Salvors, Inc. should issue. In Loudermill, this Court issued what it called a "clearer holding", it is not yet being followed.

Respectfully submitted,



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APPENDIX A

LOUISIANA CIVIL SERVICE REGULATIONS

6.24 Definition of Overtime Hour.

An overtime hour is an hour worked by an employee at the direction of his appointing authority.

(a) On a day which is observed (1) as a holiday in the department and area in which he is employed and which falls on a day within his workweek as designated under the provisions of Rule 11.1(c) or 11.2(b): or (2) as a designated holiday in lieu of a regular holiday observed in the department.

(b) In excess of the regular duty hours in a regularly scheduled workday as designated under Rule 11.1(c), or 11.2(b): or

(c) In excess of the regular duty hours in a regularly scheduled workweek as designated under 11.1(c), or 11.2(b).

(d) In excess of forty (40) hours worked during any regularly recurring and continuous seven-day calendar work period where excessive hours are systematically scheduled. Any holiday observed during the

work period is counted as a day worked.

(e) In excess of eighty (80) hours worked during any regularly recurring continuous bi-weekly calendar work period where excessive hours are systematically scheduled. Any holiday observed during this work period is counted as a day worked.

(f) In excess of the hours worked in a regularly established, continuous, and regularly recurring work period where hours average forty (40) hours per week, regardless of the manner in which scheduled, and where excessive ours are systematically scheduled. Any holiday observed during the work period is counted as a day worked.

(g) A day on which a department or a division thereof, is closed by direction of the appointing authority because of natural emergencies, in accordance with the provisions of Section B(5) of the Louisiana Revised Statute 1:55.

6.25 Compensation for Overtime Hours Worked.

(a) In addition to the regular salary and subject to other provisions in these Rules, compensation for overtime hours shall be computed and given in the following manner:

(1) Time and one-half shall be one and one-half times the hourly rate of pay for the class of position the employee occupies.

11.29 Compensatory Leave.

(a) Subject to provisions of Subsections (b) and (g) of this Rule, and in accordance with Rules 6.24 and 6.25 and the requirements of Federal rules, statutes, regulations and judicial decisions, employees who are required to perform overtime duty may, at the option of the appointing authority be credited with compensatory leave equal to the number of extra hours he has been required to work.

(b) Compensatory leave shall not be credited to any employee in the classified service while

he is serving on an intermittent basis.

(c) Subject to the provisions of Subsections (e) and (f) of this Rule, compensatory leave credited to an employee may be used by him, with the approval of his appointing authority, at a future time or times.

(d) An employee who has been credited with compensatory leave may be required, by his appointing authority, to take all or part of such leave at any time.

(e) All compensatory leave credited to an employee shall be cancelled upon his separation from the department in which he earned it. Such leave shall not be recredited to him upon his reemployment in that or any other department.

(f) Not more than forty-five (45) working days, or the equivalent thereof in hours, of accrued unused compensatory leave shall be carried forward into any calendar year.

(g) When in his administrative judgment an appointing authority determines that overtime duty must be performed by one or

more of his employees incident to national or local emergency, act of God, civil or criminal insurrection, civil or criminal disobedience, or similar occurences of an extraorinary and emergent nature which threatens or affects the peace of property of the people, he may require such employee or employees to perform overtime duty: and the provisions of Rules 11.29(a) and 6.25(d) and (e) shall not apply to such duty, unless such overtime is required by Federal rules, statutes, regulations and judicial decisions.

LOUISIAN REVISED STATUTE

R.S. 40:1373. Five Day Work Week for Employees

The department shall arrange the work of the office of state police so that no employee shall be required to work more than five days per calendar week without being granted compensatory time off for the period worked in excess of five days.

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
JULY 20, 1984
PARKER, C. J.

JAMES JACKSON, ET AL

VERSUS **CIVIL ACTION**

DEPARTMENT OF PUBLIC SAFETY, ET AL **NO. 83-3-A**

This cause came on this day for hearing on on defendants' motion to dismiss for lack of jurisdiction, and motion for judgment on the pleadings.

PRESENT: Dennis Whalen, Esq.
Patrick McGrew, Esq.
Counsel for plaintiffs

Howard P. Elliott, Jr., Esq.
Counsel for defendants

Counsel present their arguments to the court.

Defendants' motion is GRANTED as to the claims against the Department of Public Safety and DENIED as to the claims against the individual defendants.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JAMES JACKSON, ET AL

VERSUS

THE DEPARTMENT OF PUBLIC SAFETY FOR THE STATE OF LOUISIANA, ET AL

CIVIL ACTION

NO. 83-3-A

The matter which is presently before the court is defendants' motion for summary judgment, which plaintiff opposes. Oral arguments have been heard and extensive briefs and exhibits have been filed by both sides.

In an attempt to reconcile budgetary limitations with public safety and adequate compensation for state employees, Louisiana has elected establish a scheme, part legislative, part administrative, which provides for compensatory time off for most overtime work. The federal constitutional sufficiency of the state scheme as applied to Louisiana state troopers is here challenged.[1]

This case involves the allegation of plaintiff, a Louisiana state trooper, that the Department of Public Safety, his employer, and the individual defendants, a

former Secretary and Deputy Secretary of the Department, have deprived him of property under color of state law and without due process, in contravention of the Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction over the subject matter of this lawsuit is premised upon 28 U.S.C. 1331, since the claim arises under 42 U.S.C. 1983. Plaintiff alleges that his claim is made for himself, and a class consisting of all similarly situated Louisiana state troopers: however, he has so far been unsuccessful in his attempt to certify the class. The Department of Public Safety has been dismissed from the suit on the basis of the state's sovereign immunity under the Eleventh Amendment, leaving only the individual defendants. The motion for summary judgment claims that under the undisputed facts, defendants are entitled to a qualified immunity from suit as a matter of law. In the alternative, defendants allege the existence of adequate post-deprivation remedies which satisfy the requirements of due process. Finally, this court has noted sua sponte that any procedural due process inquiry must begin

with the question of whether the plaintiff has a cognizable property interest at stake: therefore, this issue has also been briefed.

The court has carefully reviewed the exhibits submitted by the parties, the briefs, transcripts or oral arguments, and the applicable statutory and administrative material. The facts essential to the resolution of this motion are undisputed. The plaintiff is a Louisiana state trooper who is routinely required to work more than forty hours per week in order to perform his duties. He is compensated for this overtime work by "time and a half" payment or, after the modest annual appropriation for overtime payment is exhausted, by credit on the Department's records for compensatory time off at the rate of one hour off for each extra hour worked. At the end of each year, if he has accumulated more than 45 days (360 hours) of compensatory time on the books and has not taken this time off from work, any hours in excess of 360 hours are erased and are not carried forward into the next calendar year.[2] Plaintiff concedes that he is not arbitrarily singled out for this treatment; the Civil

Service regulations which establish this procedure are uniformly and indiscriminately applied and have a similar effect on other state troopers[3] who accumulate compensatory time beyond the 360-hour cut-off point. The policy and its regular annual enforcement are known to plaintiff, and no specific notice or hearing takes place before the "excess" compensatory time is eliminated from the records of the Department. The eradication of accrued compensatory time in excess of 45 days is effected pursuant to Civil Service regulations which have the force of law.

There are a number of statutes and regulations which mandate and define compensatory time for Louisiana state troopers. La. R.S. 40:1373 provides:

> The department shall arrange the work of the office of state police so that no employee shall be required to work more than five days per calendar week without being granted compensatory time off for the period worked in excess of five days.

The term "compensatory time off" is not defined, nor does the statute prescribe a measure of compensatory

time off. The Legislature apparently elected to leave it administrative authority, specifically the State Civil Service Commission,[4] to fill in the gaps in the legislative scheme. The Civil Service rules contain detailed provisions concerning the definition and computation of compensatory time. (These rules, in 6.25(e), also provide for cash payment for overtime to ranks of sergeant and below under some circumstances, as does La. R.S. 32:733 for any state trooper; these provisions are not at issue in this lawsuit). Civil Service Rule 6.24 Defines an overtime hour and Rule 6.25 describes and defines the various types of compensation which are available for overtime work, as well as how the compensation is to be computed. With reference to compensatory time, Rule 6.25 states:

> (a) In addition to the regular salary and subject to other provisions in these rules, compensation for overtime hours shall be computed and given in the following manner:
>
> (3) Compensatory time shall be credited at the rate of one hour of compensatory time for each overtime hour worked.

Rule 6.25 further provides, in sub-paragraph (d), that

the appointing authority has discretion in crediting compensatory time equal to the number of hours which an employee is required to work overtime, subject to the definitions and limitations contained in certain other provisions in the rules.

Various types of leave, including annual leave, sick leave, and compensatory time off work, are defined with particularity in chapter eleven of the Civil Service rules. Compensatory time is covered by Rule 11:29(a) through (g). Rule 11.29(a) basically reiterates the discretionary nature of the compensatory time credit, stating:

> ... employees who are required to perform overtime duty may, at the option of the appointing authority, be credited with compensatory leave equal to the number of extra hours he has been required to work.

Compensatory time is limited by Rule 11.29 in a number of ways. sub-paragraph (b) eliminates this option for employees serving on an intermittent basis, and sub-paragraph (e) describes certain situations of an extraordinary or emergency nature in which

compensatory time is inapplicable for overtime work. In sub-paragraph (c), an employee is given an opportunity to use his compensatory time in the future, subject to the approval of his appointing authority, but sub-paragraph (d) gives the appointing authority the right to insist that the employee take all or a part of his leave at any time. Finally, the conditional nature of compensatory time is emphasized by two additional provisions. Rule 11.29(e) states that all compensatory leave credited to an employee shall be cancelled upon his separation front the department in which he earned it, with no possibility of having those credits reinstated and Rule 11.29(f), which is the clause at issue in this lawsuit, states that:

> Not more than forty-five (45) working days, or the equivalent thereof in hours, of accrued unused compensatory leave shall be carried forward into any calendar year.

Although inelegantly phrased, the Civil Service rules follow a pattern which moves from the general to the specific. First the concept of overtime is defined (Rule 6.24). Then the three types of payment

available for overtime work (time and one-half, straight time, and compensatory time) are defined and the method of computing each is described. [Rule 6.25(a)] The remaining sub-paragraphs of Rule 6.25 discuss the eligibility criteria for each type of overtime compensation and the differential treatment of employees according to grade level. Finally, the compensatory time provisions in chapter eleven delineate the times, circumstances, and conditions under which compensatory leave can be taken by the employee, as well as the conditions under which it will be lost.

It is the existence of a condition under which accrued compensatory time is lost which is at the heart of this litigation. Plaintiff contends that the yearly erasure of accrued compensatory time beyond 45 days is a taking of property without due process of law. He reasons that the compensatory time is payment for overtime work and that the credit on the Department's records is a recognition that he has earned this time off and is therefore entitled to receive it. Although he is aware of the potential

removal of the excess compensatory time if he does not take it within the year it is earned,the nature of his work is such that he is often unable to take the time off and thus it accumulates beyond the 45-day cut-off point and is taken away from him at the end of the year. Since there is no pre-deprivation hearing, plaintiff argues that the taking of his "earned compensation" is accomplished without due process of law. And he asserts that the appeal provisions available to him in the Civil Service rules are constitutionally inadequate because in his case the rules are being consistently applied precisely as written, and the appeal process is directed toward situations in which the rules are ignored or are enforced in a discriminatory or arbitrary manner. Thus plaintiff contends there is no adequate post-deprivation hearing.

Despite repeated invitation to do so, plaintiff has been unable to spell out what procedural remedy would be appropriate here. An administrative hearing, as suggested by counsel, before the end of the calendar year and striking of the excess hours, would avail nothing. The Secretary and Deputy Secretary

must provide for adequate staffing to protect the public and they could not fail to comply with the Civil Service rules which mandate the striking. No facts which could be established at such a hearing could change the result one whit. Plaintiff does not claim arbitrary administration of the system because it is the system itself which dictates the result. Although counsel has not admitted it, procedural due process is actually not at issue here - there is no procedure that the defendants could accord plaintiff that would prevent loss of the excess hours. Thus plaintiff's claim is actually a substantive due process claim. If plaintiff has any claim it is that the system (process) established by the state deprives him of his property (accumulated compensatory time off) without just compensation in violation of the Fifth Amendment, which presumptively is made applicable to the states by the Fourteenth Amendment. If indeed the state's process constitutes a confiscation of plaintiff's non-contraband property, there is no procedural avenue which the state can provide which would validate the taking, for it is the

taking itself which is forbidden by the Constitution. Because of the ultimate conclusion that plaintiff's compensatory time off is not "property" under the facts of this case, these issues are not reached. However, the substantive due process analysis of an economic issue has traditionally involved scrutiny under the "rational relationship" test, and the state's rationale in striking a balance between budget restrictions, compensation for its police force, and the requirements of public safety has already been suggested.

The leading cases discussing the circumstances under which constitutionally protected property interests are created by state law are Board of Regents v. Roth, 408 U.S. 563, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and its companion case, Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The Supreme Court in Roth stated succinctly that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He

> must, instead, have a legitimate claim of entitlement to it ... Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, supra, at 2709. In Perry, the court further noted that:

> ... 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' ... A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and

that he may invoke at a hearing. (citations ommitted)

Perry, supra, at 2699. The essence of "property" in the constitutional sense is an individual entitlement grounded in state law. Further, the entitlement must be one which cannot be removed except for cause. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982).

Under the above precepts, a wide range of interests have been found to be "property," that is, individual entitlements granted by state law which cannot be removed except for cause. Included among these are a horse trainer's license, Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979): utility service, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978): disability benefits, Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); a high school education, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); a driver's license, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971): welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287

(1970); and a cause of action, Mullane v. Central Hanover Bank & Trust Co., 339 U.s. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1975). In Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981), a case analyzing the property and liberty aspects of state parole provisions, the court further explained the correct standards for evaluation of the individual interest at stake. Citing Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), the Jago decision noted that the court had previously rejected the idea that any grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the Due Process Clause. The question involves more than the weight or subjective importance of the individual's interest. The nature of the inquiry turns on the nature of the relationship between the individual and the state and the protected and unprotected status of the interest claimed by the individual vis-a-vis the state. In Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the court reiterates this concept, stating:

It is apparent from our decisions that there

> exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Paul, supra, at 1165. Not every interest accorded by state law is a "property" interest within the meaning of the Fourteenth Amendment. Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980). When the diversity of interests which have been found constitutionally protected "property" are compared to those interests which are not afforded this protection, it becomes clear that the type of interest does not, in and of itself, define "property" in the constitutional sense, although the importance of the interest to the individual is a factor to be considered. One person's

interest in continued employment as a university professor is not "property" (Roth, supra), while another's identical interest may be "property." (Perry, supra). The focus is on the protection of the particular interest in state laws, rules, or mutually explicit understandings, such that the individual's entitlement to the benefit is clearly understood and established. The cases are consitent in holding that, absent an entitlement to certain benefits, the plaintiff's unilateral expectation falls short of a property right. Not every interest accorded by state law is a "property' interest within the meaning of the Fourteenth Amendment. Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980).

Of all the cases in which "property" under the Fourteenth Amendment is discussed, the facts of this case most closely resemble those in Brown v. Brienen, 722 F.2d 360 (7th Cir. 1983). The plaintiffs in that case were county employees under the supervision of the sheriff. A county ordinance provided that compensatory time, equal in amount to hours worked over a certain limit, may be granted, and the sheriff

had promised to comply with the ordinance. However, as the sheriff's workload increased and the county board failed to appropriate more money to hire additional employees, the compensatory time accrued faster than the sheriff could allow it to be taken without endangering public safety, and a large backlog accrued. The suit claimed that the property right of the plaintiffs in accrued compensatory time was being taken from them without due process of law by the sheriff's refusal to allow them to take their time off and by the Board's refusal to properly fund the department. The district court agreed that a deprivation of property had occurred, but found that plaintiffs had not been denied due process, because they had state remedies available. The Seventh Circuit did not pass upon the deprivation of a property interest since that issue was not appealed, but obviously felt strongly that the interest was not one to which constitutional protection should be applied. The court several times expressed its doubt that the compensatory time was "property" in the Fourteenth Amendment sense, and commented:

But the Constitution must not be trivialized

> by being dragged into every personnel dispute in state and local government. Disputes over overtime, over work assignments, over lunch and coffee breaks do not implicate the great objects of the Fourteenth Amendment.

Brown, supra, at 365. We note that the protection given to the compensatory time in Brown was greater than that provided by the Louisiana regulatory scheme which governs the matter before the court. Therefore, if the overtime compensation in Brown was of such doubtful status as "property" in the constitutional sense, the claim of plaintiff in the instant case is even more doubtful.

Applying these legal principles to the undisputed facts in this matter, the court must conclude that the plaintiff has not demonstrated a constitutionally protected interest in this instance. Looking at the entirety of the statutes and regulations governing the overtime compensation for Louisiana state troopers, it is clear that the "mutually explicit understandings" between the plaintiff and his employer include the condition whereby compensatory leave cannot be

indefinitely accumulated by the employee. The plaintiff's expectation under the Civil Service rules must be that if he accumulates over 360 hours of overtime during a given year, he must take that time off or lose it. He cannot carry the excess compensatory time forward from year to year and continue to accumulate it. In this respect, his entitlement to the compensatory time off is a limited one, limited by the very rules which define the nature of the benefit. Plaintiff in this case has no legitimate expectation that he can retain any compensatory time which he accumulates beyond the 45-day limit. The limitation is clear, constant, ascertainable in advance of employment, and is not applied in a discriminatory manner to divest plaintiff of rights which other similarly situated individuals enjoy. Clearly the situation presents a Hobson's choice to everyone in the Department of Public Safety: There is no choice but to furnish sufficient manpower to protect the public, which means the plaintiff (and others) will inevitably work overtime and accumulate compensatory time off which he will be unable to use because of the needs of the service some of which will

ultimately go uncompensated because there is no choice but to comply with Civil Service rules. However, as noted above, the weight of the plaintiff's interest is not the telling factor in determining the existence of "property" in the constitutional sense. It is the protection given to that interest by state law which is determinative. The state has clearly established a procedure whereby, in certain instances, it can compensate plaintiff for only a portion of the extra hours which he works. While this situation is unfortunate, it is not unconstitutional.[5]

Although plaintiff argues to the contrary, the court's conclusion that plaintiff's interest in unlimited accrual of compensatory time is not "property" is not in conflict with the previous unpublished decision in Parrish v. City of Baton Rouge, CA No. 80-170 (June 30, 1982), where this court found that plaintiff's interest in his accrued compensatory time was a protected property interest. In that case, there was no regulatory or implied limitations upon the accrual of compensatory time. Instead, there was a practice of maintaining an

employee on the books after his resignation for a period of time equal to that accrued compensatory time, during which period he received his regular pay. This generally followed practice was arbitrarily enforced to deny plaintiff Parrish his accumulated compensatory time. The interest was "property" in the constitutional sense precisely because of the practice which had become a part of the "mutually explicit understandings" between the plaintiff and his employeer. This contrasts with the instant case, in which the "understandings" include a specific limitation on the accrual of compensatory time. The contrast between the two cases further exemplifies that fact that the same type of interest may be constitutionally protected in one situation and not in another.

Plaintiff has argued that the legislature is given final authority over wages for state policemen by virtue of ARticle 10, Section 10 of the Louisiana Constitution. From this, he contends that the legislation which mandates compensatory time for any period worked in excess of five (5) days, La. R.S. 40:1373, takes precedence over the Civil Service rules

and establishes plaintiff's entitlement. He concludes that therefore the alteration of this entitlement by the rules is unconstitutional.

This argument has two major weaknesses. First, Article 10, of the responsibility for fixing hours and wages for state employees. The only exception to the broad rule-making power of the Commission is the reservation to the Legislature of power to enact laws "supplementing these uniform pay plans for sworn, commissioned law enforcement officers of the Division of State Police, Department of Public Safety.: La. Const., Art. 10 Sec. 10 (1974). The wording of La. R.S. 40:1373 does not clearly manifest a legislative intent to "supplement" the uniform pay plan established by the Civil Service Commission. Rather, it sets out in general terms a five-day work week with an undefined length of a "day" and an undefined "compensatory time off" for hours worked beyond that five-day week.

It is the Civil Service rules which defined the "day" of work, the "overtime" work, and the "compensatory time off" work to which reference is

made in the statute. Thus the rules are not in conflict with the legislative provision, but are an elaboration and particularization of those provisions.

The second weakness of plaintiff's argument is that, even if we were to accept plaintiff's contention that Rule 6.25(f) is in conflict with the legislative intent of La. R.S. 40:1373, we are not at all convinced that the rule must give way to the legislation in this instance. Plaintiff has not provided this court (nor has our independent research revealed) any Louisiana case which interprets the "supplemental pay" reservation of Article 10 Cas.10 in such a way that it clearly applies to the compensatory time provisions which are at issue in this lawsuit. And in reviewing the Louisiana jurisprudence which has addressed similar conflicts between the Constitutions of 1921 or 1974 and the Civil Service rules, the weight of authority appears to support resolution in favor of the Civil Service rules. See Barnett v. Develle, 289 So.2d 129 (La. 1974); La. Civil Service League v. Forbes 246 So.2d 800 (La. 1971); Meaux v. Dept of Hwys., 228 So.2d 680, writ refused, 230 So.2d 590 (La. 1969): c.f. N.O. Firefighters Ass'n v. Civil

Service Commission of City of N.O., 422 So.2d 402 (La. 1982). Thus, while we do not interpret these provisions of the rules as conflicting with the Louisiana Constitution, and therefore do not presume to decide this question of Louisiana law, we do note that the Louisiana jurisprudence on this issue is generally not supportive of plaintiff's argument. In conclusion, plaintiff has not "entitlement" to the unlimited and indefinite accrual of compensatory time, based upon the state laws, regulations, and understandings which indisputably establish his right to some degree of compensatory time.

Since we find that plaintiff has not established a "property" right, there is no need to inquire into the method by which the compensatory time is eradicated, because procedural protections are due only for constitutionally protected interest. Nor do we address the issue of defendant's qualified immunity, other than to note that we find that there has been no violation of law, established or otherwise, by any defendant. Accordingly, defendant's motion for summary judgment if GRANTED and there will

be judgment in favor of defendants.

Baton Rouge, Louisiana, December 27, 1985.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

FOOTNOTE

1. This action presents claims strictly under the federal Constitution. There is no claim regarding possible application to state troopers of the Fair Labor Standards Act, hence the recent decision of the Supreme Court in Garcia v. San Antonio Metro. Transit Authority, 426 U.S. 833, 105 S.Ct. 1005,___ L.Ed.2d___ (1985) has not been considered.

2. The defendant Bollinger, as Secretary, instituted a policy of directing supervisor to regularly review accumulated "K-time" and require that officers take the time take the time off before losing it. Obviously this is not always head of the State Police requested that the Civil Service Commission modify the regulations as they apply to state troopers. The Commission denied the request.

3. As well as other state employees.

4. The Civil Service Commission is created and granted authority over the classified service, including state troopers, by Article 10, Section 2(A) and (B) of the Louisiana Constitution of 1974. The Commission is granted "general rule-making ... power for the administration and regulation of the

classified service," Art. 10, Sec. 10(A)(1), although any rule affecting wages or hours shall have the effect of law only after approval of the Governor. Art. 10, Sec. 10(C). Since both sides cite and rely upon the rules which have been filed in the record, we assume guvernatorial approval, although no evidence of such has been presented.

5. Plaintiff concedes, as he must, that the federal Constitution does not mandate hours, wages or conditions of employment for state employees.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-3191

JAMES JACKSON, Individually and as a Member of a Class of Similarly Situated Individuals,

Plaintiffs-Appelants,

Versus

THE DEPARTMENT OF PUBLIC SAFETY FOR THE STATE OF LOUISIANA, ET AT.,

Respondents-Appellees

Appeal from the United States District Court for the Middle District of Louisiana

(September 5, 1986)

PER CURIAM: AFFIRMED. See Local Rule 47.6

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-3191

JAMES JACKSON, Individually and as a Member of a Class of Similarly Situated Individuals,

Plaintiffs-Appelants,

Versus

THE DEPARTMENT OF PUBLIC SAFETY FOR THE STATE OF LOUISIANA, ET AT.,

Respondents-Appellees

Appeal from the United States District Court for the Middle District of Louisiana

(October 2, 1986)

The Petition for Rehearing is DENIED.

The Petition for the Suggestion for Rehearing En Banc is also DENIED.

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of December, 1986, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, return receipt requested, to Howard P. Elliot, Jr., Esq., General Counsel, Department of Public Safety, P. O. Box 66614, Baton Rouge, Louisiana 70896, (504) 925-6103, counsel for the respondents. I further certify that all parties required to be served have been served.

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